85-1227

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROY P. BRIEHLER,

Petitioner,

v.

SYLVIA'S, INC., a Rhode Island corporation, WILLIAM BURGIN, JOSEPH PERRY, DAVID F. FOX, ROBERT M. SILVA, LTD., DENNIS TABER, POSEIDON VENTURE, INC., a Rhode Island corporation, and JERRY L. McINTYRE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR WRIT OF CERTIORARI

Roy P. Briehler,
Petitioner - ProSe
1740 North Olden Ave.
Trenton, N.J. 08638

QUESTIONS PRESENTED

1. Is a federal pretrial proceeding, which itself deprives a plaintiff of due process of law and denies a plaintiff equal protection of the law, and which results in the absolute and substantial deprivation of plaintiff's property, business, and leasehold rights (which said rights were confiscated in the first instance by the defendants without due process of law to plaintiff), and which results in the denial of plaintiff's right of trial by jury on the merits of his claims, Constitutional?

   a.) May Constitutional guarantees be denied to a plaintiff by unconstitutional pretrial procedures?

   b.) Are there Constitutional limitations upon the federal court's use of unconstitutional pretrial procedures to dismiss with prejudice a plaintiff's due process claim without a trial on the merits?

2. Is it a manifest abuse of judicial discretion to deny a plaintiff his right to his property, business, and leasehold rights, all of which were confiscated by defendants with no due process of law to plaintiff and in flagrant violation of the majority of the State statutes controlling levy and sale on Execution of personal property, and to deny a plaintiff his right of trial by jury on the merits of his claims, by the dismissal, with

prejudice, pursuant to Federal Rule of Civil Procedure 41(b), of the plaintiff's civil action, when:

a.) There is evidence of Constitutional violations;

b.) The Magistrate's Report and Recommendation on which the Order of Dismissal was based, was factually erroneous;

c.) The facts and evidence prove that plaintiff obeyed and complied strictly and completely with all Orders of the Court;

d.) The facts and evidence prove that plaintiff prosecuted his claim diligently;

e.) The matter has not been scheduled for trial and plaintiff has no history of undue delay;

f.) There are genuine issues of fact to be resolved;

g.) Discovery is not completed;

h.) The facts and evidence and circumstances support a judgment for the plaintiff; and,

i.) The defendant-attorneys have actively attempted to make plaintiff's prosecution of his civil action impossible, impracticable, and futile?

3. Is it a manifest abuse of judicial discretion to deny a federal plaintiff a change of venue to where all of the plaintiffs reside, in the interests of justice and of obtaining a fair and impartial trial, when denial thereof sanctions the imposition of conditions upon the plaintiff which are not authorized by reason and by law?

PARTIES

The caption identifies all parties.

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DECISIONS BELOW

The Order of the United States Court of Appeals for the First Circuit, entered on September 12, 1985, which is reprinted in the appendix at A-1 and A-2 and is not reported, affirmed the Orders of the United States District Court, District of Rhode Island, which are reprinted in the appendix at A-3 and A-4 through A-23 and are not reported. The United States Court of Appeals for the First Circuit denied a petition for rehearing on October 24, 1985. Said unreported Order is reprinted in the appendix at A-24.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. CONSTITUTION OF THE UNITED STATES - Amendment V

> "No person shall be. . .deprived of life, liberty or property, without due process of law; nor

shall private property be taken for public use, without just compensation."

2. CONSTITUTION OF THE UNITED STATES- Amendment VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

3. CONSTITUTION OF THE UNITED STATES - Amendment XIV

Section 1:

". . .Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Rule 38(a), Federal Rules of Civil Procedure

"The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

5. Rule 41(b), Federal Rules of Civil Procedure

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court;. . . a dismissal under this subdivision . . .operates as an adjudication upon the merits."

6. Rhode Island General Law 9-26-2:

> "Every officer to whom a writ of execution or other judicial writ shall be lawfully issued shall execute the mandates therein contained as commanded, and shall make returns of his doings thereon. If he be unable to execute such mandates, he shall set forth the reason of his failure in his return."

7. Rhode Island General Law 9-26-4:

> "The following goods and property shall be exempt from attachment on any warrant of distress or on any other writ, original, mesne, or judicial:
>
> (1) The necessary wearing apparel of a debtor or of his family, if he has a family.
>
> (2) The working tools of a debtor necessary in his usual occupation, not exceeding in value the sum of five hundred dollars($500), and the professional library of any professional man in actual practice. . ."

8. Rhode Island General Law 9-26-9:

"The proceeds of the sale shall be applied to the payment of the amount due on the mortgage, with such deduction for interest for the anticipated payment, or allowance for damages for such anticipated payment, as may be ascertained and allowed by the court to which the execution is returnable, and the balance shall be applied to the payment of the amount due on the execution."

9. Rhode Island General Law 9-26-11:

"If the mortgage be not redeemed by the plaintiff or sold as before mentioned, before the time of redemption expires, the attachment shall become void."

10. Rhode Island General Law 9-26-12:

"In all cases when execution shall be levied on any goods or chattels, such goods and chattels shall be kept in the possession of the officer and shall be advertised at least ten (10) days before they shall be exposed and offered for sale, in order that the person who owned such goods or chattels may, if he think fit, pay the money due, together with the costs which shall have accrued thereon, and thereupon have his said goods or chattels restored to him again; Provided, That if such goods and chattels shall be of a

quickly perishable nature, the officer levying execution thereon shall immediately notify the defendant or his agent issuing the execution, to sell said goods and chattels at such time and in such manner as said court or justice may prescribe, and such order may be obtained at any time."

11. Rhode Island General Law 9-26-13:

"In case such owner shall not redeem them as aforesaid, and in case they be not sold under special order, the officer shall sell the same at public auction to the highest bidder, and in any case if any overplus shall remain after the debt or damages and costs and charges are paid, the same shall be delivered by the officer or to any person legally qualified on his behalf to receive the same."

12. Rhode Island General Law 9-26-17:

"The officer may, for good cause, from time to time adjourn the sale of said real estate or of any interest therein levied on, giving one (1) week's notice thereof by publication in some public newspaper in the manner above provided."

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION

The jurisdiction of the United States District Court for the

District of Rhode Island was invoked pursuant to 28 U.S.C. 1332 under diversity of citizenship with the amount in controversy in excess of $10,000.00. All plaintiffs are citizens of the State of New Jersey; all defendants are citizens of the State of Rhode Island.

NATURE OF THE ACTION

This matter evolves from United States District Court, District of Rhode Island, Civil Action No. 83-0173 P, Roy P. Briehler, Et. al. vs. Sylvia's, Inc., Et. als., wherein plaintiffs sought compensatory and punitive damages for defendants' intentional constitutional violations of plaintiffs' property rights without due process of law; for defendants' conversion of plaintiffs' property having a fair market value in excess of $2,500,000.00; for defendants' malicious and tortious interferences

with the business relationships and the economic benefits and advantages of plaintiffs; and for defendants' malicious and tortious abuses of process, surrounding defendants' wrongful confiscation, on February 26, 1983, of the United States documented 185', 700-ton, all steel ferry boat "THE NARROWS", (which had been converted by the plaintiffs into a fully-equipped and operational restaurant and cocktail lounge, and a fully-equipped and operational floating hotel with forty staterooms aboard, all with full tile baths, and a fire alarm system throughout), and of all of the property aboard, with no notice whatsoever to the property owners thereof, and in blatant violation of Rhode Island General Laws 9-26-2; 9-26-4; 9-26-9; 9-26-11; 9-26-12;

9-26-13; and 9-26-17, under the cloak of two Court-sanctioned Execution "Sales", which lacked all of the requirements necessary to be deemed "public auctions", for an alleged sum of $931.34.

STATEMENT OF FACTS

On September 3, 1971, Roy Briehler's of New Jersey, Inc., a New Jersey corporation in good standing ever since 1961, purchased the United States documented ferry boat "THE HARROWS" from the United States Government, Office of Defense Surplus Sales, at Middletown, R.I. Recorded title to "THE HARROWS" has remained in Roy Briehler's of New Jersey, Inc. since its purchase in 1971. Said ownership is also recorded with the Town of Jamestown and various State of Rhode Island departments and agencies, Public Utitlities Commission and the

R.I. Secretary of State, Uniform Commercial Code Division, and in U.S. District Court, R.I., C.A. No. 80-211.

On November 8, 1971, plaintiff Briehler entered into a 25-year lease with the State of Rhode Island and the Town of Jamestown. Said lease was drafted by the Town of Jamestown. Thereafter, "THE HARROWS" was towed from New York to the waters adjacent to Jamestown, Rhode Island and has remained afloat in the waters of the Atlantic Ocean ever since.

In April of 1972, Briehler formed Inn Island, Inc., a Rhode Island corporation. The Town of Jamestown created and issued a new BT Alcoholic Beverage license at East Ferry, Jamestown, R.I., and approved renewal of that liquor license every year thereafter through November, 1983. Inn Island operated the restaurant and forty-room motel aboard

"THE NARROWS" seasonally.

Over the next twelve years, the plaintiffs spent hundreds of thousands of dollars for the conversion and operation of "THE NARROWS" and for the development of East Ferry in Jamestown. Funds for development were supplied by the plaintiffs and by loans from one Katherine A. Worthington, the recorded lienholder on "THE NARROWS".

There has been, and was on Feb. 26, 1983, a perfected recorded security interest in "THE NARROWS" since June 12, 1980, filed with the R.I. Secretary of State, Uniform Commercial Code Division.

In August, 1982, defendant Sylvia's, Inc., (a trespasser and encroacher in and upon Briehler's leased premises), sued "Roy T. Briehler alias John Doe d/b/a Jamestown Ferry Boat" and Inn Island, Inc. in Newport County District

Court for an alleged gas account and for alleged autombile repairs in the combined total of $738.61. Briehler and Inn Island counterclaimed against Sylvia's for the destruction of Briehler's automobile in the amount of $10,000.00. After trial, on Thursday, Oct. 14, 1982, Judgment on Decision was entered for Sylvia's against Briehler and Inn Island in the amount of $602.61, plus interest and costs, and for Briehler and Inn Island on their counterclaim. Briehler filed an appeal on Monday, Oct. 18, 1982. Briehler filed an appeal on Monday, OCtober 18, 1982.

The appeal was subsequently dismissed and remanded to District Court. Briehler and Inn Island were not noticed of the hearing or of the dismissal.

Two Executions #82-779 were issued -

one on Oct. 18, 1982 (issued from a Default Judgment entered two days prior to trial when no default existed) against Inn Island, in the amount of $810.73, and one on Jan. 12, 1983, against Briehler, in the amount of $718.25.

Briehler and Inn Island were given no notice that the Executions had issued. They were given no opportunity whatsoever to satisfy the Executions. The other owners of property to be seized - Briehler Properties, Inc., Roy Briehler's of N.J., Inc., and Katherine Worthington - were given no opportunity whatsoever to satisfy the Executions, nor were they given notice that their property had been levied upon and was to be confiscated.

On February 26, 1983, without offset of Briehler's and Inn Island's counter-claim, two Constable "Sales" were allegedly held of Inn Island's and of Briehler's

right, title, and interest in and to a ferry boat "Narrows" - not "THE NARROWS" - with no notice whatsoever to the judgment debtors or the property owners.

Having formed a prior clandestine partnership, defendants Burgin and attorney McIntyre, (President of the Town Council of the Town of Jamestown), both of whom were and are trespassers and encroachers upon Briehler's leased premises), with no regard for ownership thereof, seized possession of "THE NARROWS" and all of the property aboard, having allegedly purchased Inn Island's interest in and to "Narrows" and Briehler's interest in and to "Narrows" for $575.00 and $356.34, respectively. Neither Inn Island or Briehler had a right, title, and interest in a ferry boat on Feb. 26, 1983.

Before the second sale was completed, before there was an alleged purchaser at the second sale (of Briehler's interest), Sylvia's allegedly arranged to pay Burgin and McIntyre $3,000.00 for approximately 6,000 gallons of fuel oil aboard, with a fair market value of approximately $9,000.00. Attorney McIntyre and Burgin also claimed title to Briehler's lease with the State of R.I. and the Town of Jamestown and title to Inn Island's alcoholic beverage license.

The Briehler interest was not sold to the highest bidder as required by law. Defendant-attorney Fox, a "Seller", so-called, does not agree with defendant-attorney-Town Council President McIntyre, a "Purchaser", so-called, as to where the "Sales" were held.

Rhode Island General Laws 9-26-2; 9-26-4; 9-26-9; 9-26-11; 9-26-12; 9-26-13;

and 9-26-17 were all flagrantly violated by the defendants. Many other irregularities and improprieties took place.

Within 72 hours of the two alleged "Sales", Burgin and attorney McIntyre formed a new Rhode Island corporation, Poseidon Venture, Inc., and transferred title of "all that was acquired" at the two "Sales", so-called, to Poseidon.

Briehler learned of the "Sales" two days after they had occurred by way of a telegram from a customer of the ferry boat who lives in Albany, New York. Five days after the "Sales" took place, attorney Fox mailed Briehler a penny change.

Town Council President, attorney McIntyre, and Burgin continue to hold possession of "THE NARROWS" and the property aboard, and continue to deny plaintiff access to and use of his

business and leasehold rights, and have completely put Briehler out of business in Jamestown, R.I., through the use of the Jamestown Police and the Jamestown Town OFfices.

PROCEDURAL HISTORY

On March 3, 1983, Briehler filed C.A. No. 83-0173P, pro se, in the U.S. District Court, District of Rhode Island, demanding a trial by jury.

Thereafter, plaintiffs retained R.I. counsel who filed injunctive action, C.A. No. 83-0964, in R.I. Superior Court, Providence County. The R.I. Superior Court granted a Temporary Restraining Order on March 9, 1983.

In June of 1983, prior to any federal proceedings of substance on the merits, the federal defendants, Town Council President,attorney McIntyre and Burgin, initiated spurious criminal trespass charges against Briehler, and the

Jamestown Police arrested Briehler, for Briehler's alleged trespass upon those premises leased to him by the Town of Jamestown and the State of Rhode Island until 1996. The Town and the State continue to prosecute State criminal charges against Briehler, and, in October, 1984, an arrest warrant improperly issued against Briehler on those charges.

In March, 1984, the R.I. Superior Court injunctive action came on for trial before J. Needham with a jury present. The jury sat for three weeks and was subsequently dismissed by J. Needham prior to adjudication. On April 19, 1984, J. Needham ruled in favor of defendants Poseidon,Burgin, McIntyre and Sylvia's and refused to grant injunction.

Plaintiffs filed Appeal No. 84-188 in R.I. Supreme Court, which granted

an injunction pending appeal on April 19, 1984.

In May of 1984, plaintiffs' attorney withdrew.

Briehler kept the federal Court fully advised of all of the facts and evidence of Constitutional and R.I. Statutory violations surrounding the two Constable "Sales". He kept the federal Court fully advised of the State criminal proceedings against him initiated by the federal defendants. Briehler kept the federal Court fully advised of his exhaustive and diligent efforts to retain new R.I. counsel, having corresponded with every attorney and/or law firm in R.I. listed in Martindale-Hubbell.

On November 4, 1984, realizing that a fair and impartial trial was

impossible in Rhode Island, Briehler filed a Motion for a Change of Venue in the interests of justice. Said MOtion was denied without explanation. (A-3)

Thereafter, Mr. Webb of the Court Clerk's office telephoned plaintiffs' office in New Jersey and spoke with Ms. Worthington telling her to advise Briehler of a pretrial conference to be held four days later. Worthington advised Mr. Webb that Briehler was at sea off the coast of the Florida Keys operating his charter cruise business. Worthington asked the precise nature of the conferences so that she would be prepared, as her related case, C.A. No. 83-0335, was being held for pretrial conference at the same time. Mr. Webb advised Worthington to "bring anything you want". Worthington made two additional

long distance telephone calls to the C ourt, prior to the pretrial to determine the nature of the proceedings so that she could be prepared. The Court was unable to advise the nature of the proceedings. No written Order of the Pre-Trial conference for C.A. No. 83-0173 was issued.

Briehler returned to Miami on the evening of Nov. 13, 1984 where he received a note from Worthington advising of the PReTrial conference on the following morning at 10:00 AM. Briehler telephoned the Magistrate at 9:00 AM on the mor ning of Nov. 14, 1984 to advise of the situation and requested that he be permitted to attend the conference via telephone at his expense. The Magistrate refused to speak with Briehler, but relayed through his law clerk that a telephone

conference was impossible. The law clerk relayed to Briehler a verbal Order of the Magistrate - specifically that the pretrial conference was re-scheduled for November 19, 1984; that either Briehler or an attorney be present at that conference; and that Briehler file an affidavit with the Magistrate within 48 hours. The law clerk further advised that Briehler had better obey that Order or suffer the consequences.

The Magistrate gave Briehler no notice whatsoever that the attorney retained for the pretrial conference was required to agree to proceed beyond the conference. The Magistrate gave Briehler no notice whatsoever that the conference was allegedly a "settlement conference". The Magistrate gave Briehler no notice whatsoever that the attorney retained for the pretrial

conference was required to settle the matter.

No written Order was issued by the Court for this pretrial proceeding.

Briehler obeyed the Magistrate's Order completely. He filed his affidavit within 48 hours. He retained, with the help of a Philadelphia attorney, at a great expense to himself, a Fall River, Massachusetts attorney to both represent the plaintiffs at the conference and to review the files to determine if said attorney would be willing to represent the plaintiffs beyond the conference.

Attorney Kyriakakis entered his appearance for plaintiffs in both C.A. No. 83-0173P and No. 84-0230 P, participate at the conference, and reviewed the files in the two matters. This is evidenced by the letter, dated Nov. 26, 1984, from Attorney Kyriakakis to Magistrate

Hagopian. (A-25 through A-27)

Settlement discussions did not arise. However, in an abundance of caution, plaintiffs had given to Ms. Worthington, prior to the conference, absolute power of attorney, as the Magistrate was advised, had settlement discussions arisen. Attorney Kyriakakis also had settlement authority in conjunction with Ms. Worthington. As a further precautionary measure, Briehler waited by a telephone in Miami, Fla. in the event that either Ms. Worthington or Attorney Kyriakakis found it necessary to consult him.

There is no transcript or written record of the pretrial proceeding.

The Magistrate subsequently filed his Report and REcommendation, which contained several misstatements, omissions, and erroneous findings of fact, recommending that plaintiffs'

claim should be dismissed with prejudice for want of prosecution or, in the alternative, that attorney's fees be awarded to defendants. Plaintiffs filed an Objection to the Report.

No trial date was ever set for this action. Plaintiff has obeyed all Orders of the Court of which he was given notice.

The Court, meanwhile, has failed to act upon plaintiffs' various motions requiring defendants to comply with discovery orders of the Court. Said Motions were pending for more than one year. The Court has also failed, since April of 1984, to act upon its knowledge that at least one of the attorney-defendants committed perjury in his answers to plaintiff's interrogatories as to where the "Sales" were held.

On May 17, 1985, J. Pettine ordered that plaintiffs' claims be dismissed with prejudice for failure to comply with an Order of the Court, pursuant to Fed.R.Civ. Procedure 41(b), based upon his acceptance of the Magistrate's Report and Recommendation.

Briehler filed a timely appeal to the U.S. Court of Appeals for the First Circuit of J. Pettine's Order of Dismissal and of J. Pettine's Order denying plaintiffs a Change of Venue. On September 12, 1985, the First Circuit Court of Appeals affirmed both Orders of the United States District Court, District of Rhode Island.

ARGUMENT

Certiorari properly lies in the instant matter as Petitioner is calling upon this Honorable U.S. Supreme Court to determine Constitutional questions. Communist Party of the U.S.

v. Subversive Activities Control Board, App. DC, 76 S.Ct. 663, 351 U.S. 115, and to determine a question of federal pretrial procedure, Carpenter v. Winn, 31 S.Ct. 683, 221 U.S. 533.

The First Circuit Court of Appeals has sanctioned a federal pretrial proceeding which is not just a mere departure from accepted and usual judicial proceedings, but which is Unconstitutional, conducted without due process of law to plaintiff and denying the plaintiff equal protection of the law, and which resulted in an Order of Dismissal which is conclusive of plaintiff's substantial property, business, and leasehold rights and which denies plaintiff the right of trial by jury. Said sanction by the Appeals Court conflicts with the applicable decisions of this Court.

It is well established that, in order to comply with the principles of due process of law, the notice of a proceeding must be reasonable, meaningful, appropriate, and in keeping with settled practice. If a party is expected to comply with a given requirement of the Court, then the party must be given prior notice of that requirement. Fuentes v. Shevin, 407 U.S. 67; Armstrong v. Manzo, 380 U.S. 545, 552; Mullane v. Central Hanover Trust Co., 339 U.S. 314. Dismissal, with prejudice, of plaintiffs' well-documented claims, for "failure to comply" with an unstated requirement, when plaintiff has complied fully with all orders and requirements of which he was given notice, is unreasonable, arbitrary, and capricious, and is contrary to any and all standards of due process of law, and violates the Fifth and Fourteenth Amendments of the Constitution of the United States.

The rights of all persons must rest upon the same rules and modes of procedure under the same circumstances, both in privileges conferred and in liabilities imposed. Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459; Truax v. Corrigan, 257 U.S. 312.

In the instant action, the federal court has ignored and failed to act upon defendants' failure to comply with discovery orders of the Court, for some eighteen months, and has ignored and failed to act upon its knowledge of perjurious answers to interrogatories given by the defendants, while

the Court has meted out an arbitrarily-severe, oppressive punishment against the plaintiff, even though plaintiff complied fully with all stated requirements of the Court's notice of conference, in violation of

the Fourteenth Amendment to the U.S. Constitution.

There are Constitutional limitations upon the power of the Courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Societe Internationale v. Rogers, 357 U.S. 197, 211.

Petitioner is entitled to a Writ of Certiorari to protect his right of trial by jury on the merits of his constitutional claims guaranteed by the Seventh Amendment of the Constitution of the United States and which is preserved by Rule 38 of the Fed.R. Civ. Procedure. This guarantee cannot be suspended in the absence of "imperative circumstances". Beacon Theatres Inc. v. Westover, 359 U.S. 500; Harkness v. Sweeny Ind. School District, D.C.Texas, 400 U.S. 991.

The First Circuit Court of Appeal's

affirmation of the lower Court's denial of Change of Venue sanctions the imposition of conditions upon the petitioner which are not authorized by reason and by law, and were not intended by the framers of the Federal Rules of Civil Procedure

CONCLUSION

Petitioner has been denied due process of law, the right of trial by jury, and equal protection of the law. He has sufferred, and will continue to suffer, if certiorari is not granted, manifest injury and a grave miscarriage of justice. He is left with no other remedy available to him.

Justice has not been promoted. The procedures employed by the federal court, sanctioned by the First Circuit Court of Appeals, shock the sense of fair play. Equity and reason warrant the issuance of a writ of certiorari.

Respectfully submitted,
Roy P. Briehler, ProSe
1740 N. Olden Ave.
Trenton, N.J. 08638

Jan. 16, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1421

ROY F. BRIEHLER, ET. ALS.,
Plaintiffs, Appellants,

v.

SYLVIA'S, INC., ETC., ET.AL.,
Defendants, Appellees.

Before
Coffin, Bownes and Torruella,
Circuit Judges.

ORDER OF COURT

Entered September 12, 1985

Three issues are raised in this appeal from the dismissal of appellant's cause of action.

First, appellant asserts that the district court was in error in dismissing the case for lack of prosecution. Under the circumstances of this case: appellant's failure to respond to court orders; the failure to obtain counsel for the corporate plaintiffs; and his general refusal to come to Rhode Island to participate in pre-trial proceedings, we find no

abuse of discretion in the judgment of dismissal.

Appellant also claims error in the district court's denial of a motion for a change of venue and in the failure of the district judge to recuse himself.

As to the change of venue issue, we find no error. Appellant's personal convenience and his vague claims of conspiracy provide no basis for transferring a case that has no relation to any forum other than Rhode Island.

We find no indication in the record that appellant moved that the district judge recuse himself and we find no error in his failure to do so *sua sponte*.

The judgment of the district court is affirmed.

DISTRICT COURT OF THE
UNITED STATES
FOR THE

DISTRICT OF RHODE
ISLAND

ROY P. BRIEHLER, et.al.	)	
	)	
v.	)	Civil Action
	)	No.83-0173P
SYLVIA'S, INC., et.al.	)	

ORDER

The plaintiffs' motion for change of venue is hereby denied.

Enter:

/s/ Raymond Pettine
Senior United States District Judge

November 27, 1984

DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF RHODE ISLAND

ROY P. BRIEHLER, et.al.)
)
v.) C.A.No. 83-0173P
)
SYLVIA'S, INC., et.al.)

OPINION AND ORDER

PETTINE, Senior District Judge.

Plaintiffs Roy P. Briehler, Briehler Properties, Inc., and Roy Briehler's of New Jersey brought this action for damages allegedly suffered in connection with a 1983 constable's sale of plaintiff' ship. Nine named individuals, as well as "John and Mary Does, I through X", are defendants. The matter is currently befor the Court on the Magistrate's Report and Recommendation that the action be dismissed under Fed.R.Civ.P. 41(b), and motions by various defendants for summary judgment and/or a stay. For the reasons set forth below, I accept the Magistrate'

recommendation that this action be dismissed and, accordingly, need not rule on the remaining motions.

BACKGROUND

In order to understand the current posture of this action, it is useful to review some of its pertinent background. The constable's sale at issue was held in February, 1983, to satisfy an unpaid judgment against Roy Briehler (and another corporation not a party to the current action). That judgment was rendered by the Newport County District Court in 1982. Sold at this sale were plaintiffs' ship, as well as property on it belonging to either plaintiffs or to Katherine Worthington, a plaintiff in another action in this District that arises out of the same constable's sale.[1]

1. That action, Katherine A. Worthington v. Jerry L. McIntyre, et.al., C.A. No. 83-0335, is pending before Judge Bruce M. Selya.

After the sale, Roy Briehler and the corporate plaintiffs here brought a lawsuit in the Rhode Island Superior Court against four of the defendants named in the present case. The state court action,which sought injunctive relief, alleged that the sale was void on a number of grounds. Chief among these grounds were that Roy Briehler, the judgment debtor in the original Newport County District Court action, was not the owner of the ship sold at the sale; that plaintiffs did not receive adequate notice of the sale; and that the sale price was grossly inadequate. Following a three week trial, the Superior Court found that the sale was proper and ruled against plaintiffs on all claims. An appeal of that judgment is now pending before the Rhode Island Supreme Court.

Shortly before commencing the Superior Court litigation, plaintiff Roy Briehler had instituted this action,

naming as defendants all those named in the state court action, as well as several others. In March, 1984, Briehler amended his complaint to add as plaintiffs Briehler Properties, Inc. and Roy Briehler's of New Jersey. In that four count amended complaint, plaintiffs allege a conspiracy to deprive them of their constitutional rights to the due process of law; conversion of their property; interference with their contractual rights; and malicious abuse of process.

From the time this action was originally instituted, Roy Briehler has, in his individual capacity, appeared pro se. The corporate plaintiffs, on the other hand, were, for a period of time, represented by counsel. In May, 1984, however, their counsel withdrew his appearance. At that time, plaintiffs sought, and this Court granted, sixty

days in which to retain new counsel. It was agreed at that time that no hearings on the defendants' motions then pending would be set down until after the sixty day period, in which Briehler was to secure representation for the corporate plaintiffs. To date, those plaintiffs remain unrepresented.

In November, 1984, by order of Judge Selya, before whom Katherine Worthington's action is pending, the Magistrate called a settlement conference for the two cases. That conference was to be held on November 14, 1984. Although the sequence of events that followed the scheduling of the conference is set forth fully in the Magistrate's Report and Recommendation, I will summarize what ensued.

On the morning that the conference was to be held, Briehler telephoned the Magistrate to inform him that he was in Florida, had only just received notice

of the conference, could not attend the conference in any event because there was an outstanding warrant for his arrest in Rhode Island,[2] and could be contacted during the conference at either of two telephone booths. Briehler was ordered by the Magistrate to appear at a rescheduled conference to be held on November 19. On November 16, Briehler contacted the Magistrate's office to say that, in view of the outstanding arrest warrant, he could not personally come into the state and that, notwithstanding his efforts, he had been unable to retain counsel. The Magistrate advised him that he was under order to appear on November 19, either personally or through an attorney representing him, and that failure to comply would subject him to serious consequences.

2. The docket sheet in this case bears an October 19, 1984 entry reflecting "Criminal Complaint for Trespass upon the lands of another, State of R.I. and Town of Jamestown v. Roy Briehler."

On November 19, plaintiffBriehler failed to appear. Attorney Manuel Kyriakakis was present on his behalf, but Kyriakakis indicated that he had been contacted late the previous day about the matter and could not represent Briehler without first fully reviewing the case. Because Kyriakakis could not proceed, the plaintiffs remained essentially unrepresented.[3] The conference was cancelled, in light of Briehler's continued absence.

On the basis of the above events, the Magistrate concluded that "Briehler did not just fail to appear because of some mistake or inadvertence but considering the reasons communicated to the Court for his failure to appear, adamantly refused to appear," Magistrate's Report and Recommendation, at 5, and, as

3. As the Magistrate's Report states, at page 4, Attorney Kyriakakis indicated on November 20 that he would not be entering an appearance on behalf of Briehler unless he was given settlement authority. On November 26, Kyriakakis wrote the Magistrate to inform that he would not be representing Briehler.

such, had displayed a "reckless disregard for the Court's authority,"id. The Magistrate accordingly recommended that the plaintiffs' claim be dismissed under Fed.R.Civ.P. 41(b), or in the alternative, that sanctions be imposed in the form of attorneys' fees to defendants. Plaintiffs have objected to the Magistrate's recommendations and have filed a supporting memorandum.

Federal Rules of Civil Procedure 41(b) permits dismissal of an action "(f)or failure of the plaintiff to prosecute or to comply with these rules or any order of the court."[4] In construing the authority conferred by this rule, the First Circuit has said:

---

4. While, by its terms, the rule speaks of dismissal by defendant's motion, it is well-settled that a court may dismiss sua sponte. See 5 J. Moore's Federal Practice, 41.12, at 41-154 (1984) (collecting cases).

"A district court unquestionably has the authority to dismiss a case with prejudice for want of prosecution; this power is necessary to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. See Link v. Wabash R.Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed. 2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure 2370 at 199. Because of the strong policy favoring the disposition of cases on the merits, see Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. See Association de Empleados v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Richman v. General Motors Corp., supra. See also Durgin v. Graham, 372 F.2d 130, 131 (5th Cir.1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. See Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Association de Empleados v. Morales, supra; cf. Louis Forteza e Hijos, INc. v. Mills, 534 F.2d 415 (1st Cir. 1976)."

Colokathis v. Wentworth-Douglas Hospital, 693 F.2d 7, 9 (1st Cir. 1982) (quoting Medeiros v. United States, 621 F.2d 468, 470 (1st Cir. 1980), (quoting Zavala Santiago v. Gonzalez Rivera, 553 F.2d

710, 712 (1st Cir. 1977)). The question of dismissal in this case, which principally involves a failure to comply with an order of the court, rather than a strict "failure to prosecute", is governed by the same standards, see, e.g., Link v. Wabash R. Co., supra,(failure to appear at pretrial conference); Association de Empleados, et.al. v. Rodriguez Morales, supra, (failure to file brief); 5 J. Moore's Federal Practice, 41.12 at 41-152 (1984), and is likewise a matter committed to the court's discretion, see Damiani v. Rhode Island Hospital, 704 F.2d 12, 17 (1st Cir. 1983)(collecting cases); Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d 410, 413 (1st Cir. 1981). I am sensitive to the policy favoring disposition of cases on their merits and do not take a Rule 41(b) dismissal lightly. Having carefully reviewed the

record in this case, however, I conclude that the action should be dismissed.

First, the record reflects the fact that plaintiff Briehler rather cavalierly disobeyed the Court's authority. He failed to appear at the first conference, telephoning in his excuse on the morning of that conference. Notwithstanding the Magistrate's clear order as to the second conference, he again failed to appear. And little was accomplished by sending Attorney Kyriakakis on the second date, because he lacked both the authority and the inclination to proceed on plaintiff's behalf. Under the circumstances, the mere gesture of sending Kyriakakis hardly constituted good faith compliance with the Court's order. Briehler now protests that either Katherine Worthington, to whom he had given a power of attorney, or Kyriakakis, could have contacted him

by telephone to discuss matters under consideration. The Magistrate had told Briehler from the beginning, however, that he would not hold a settlement conference under such circumstances. It was unreasonable for Briehler to assume that, simply by sending an attorney without authority to the conference, he could somehow oblige the Magistrate to do so. Litigants and counsel do and should bear an obligation to proceed in good faith at pretrial conferences. Among the recognized objectives of such conferences is the facilitation of pretrial settlement. See Fed.R.Civ.P. 16(a)(5). I find that plaintiff Briehler's conduct fell far short of discharging his obligation.[5]

5. A plaintiff's pro se status is a factor to be weighed in the decision whether to dismiss under Rule 41(b). See 5 J. Moore's Federal Practice, 41.12, at 41-15(1984). Where, as here, however, the plaintiff is experienced in litigation, see Magistrate's Report and Recommendation, (Footnote continued)

Second, Briehler's refusal to come into the state of Rhode Island has implications that plainly transcend the matter of the missed settlement conferences. Through his communications with the Magistrate and his memorandum in opposition to the Magistrate's recommendation, Briehler has made it clear that he does not believe that he should be compelled to come into the state while the warrant for his arrest remains outstanding. Such a refusal on plaintiff's part puts the Court in an impossible position with respect to scheduling any future conferences, hearings or proceedings of any kind in this case, and cannot be tolerated in this era of congested dockets. See Bottos v. Pivarnik, 98 F.R.D. 416 (N.D. Ind. 1982), aff'd, 714 F.2d 147 (7th Cir. 1983) (upholding

(Footnote continued)
at 5; was apprised of the likely consequences of failing to appear; and disobeyed the court's order willfully, rather than by mistake or inadvertence, I conclude that special indulgence is neither warranted nor

dismissal under Rule 41(b) where plaintiff, inter alia, refuses to enter Indiana because of outstanding arrest warrant). And while plaintiffs' memorandum makes a number of conclusory allegations as to a "conspiracy" to obtain this arrest warrant between some of the defendants in this action and the Town of Jamestown, which is a defendant in another action brought by Briehler pending before this Court,[6] abasent any factual showing or indicia of credibility to support these bare allegations, I will not inquire into a warrant duly executed by the authorities of this state.

Briehler has not yet retained counsel for the corporate plaintiffs.

6. Roy P. Briehler v. Town of Jamestown, et. al., C.A. No. 84-0230.

"Although an individual has a statutory right to represent himself in federal court even if he is not a lawyer, 28 U.S.C. 1654, a corporation may be represented only by licensed counsel." In re Victor Publishers, Inc., 545 F.2d 285, 286 (1976) (collecting cases) (affirming district court's dismissal under Rule 41(b) for corporate plaintiff's failure to retain counsel). This rule is a well established feature of American jurisprudence, see,e.g., Osborn v. Bank of United States, 9 Wheat. 738, 830 (1824) (Marshall, C.J.) and, as the First Circuit has explained, is not ordinarily subject to exception. See In Re Las Colinas Dev. Corp, 585 F.2d 7, 11-12 (1st Cir. 1978). Nor am I inclined to make an extraordinary exception in the circumstances of this case, where plaintiff has had nearly one year to secure the required representation. As

in Victor, supra, Briehler's failure to do so weighs heavily in favor of a dismissal under Rule 41(b).

Briehler now argues that he has contacted numerous Rhode Island law firms, all to no avail, and should not thus be forced to bear the consequences. While I will not speculate as to why he has met with no success in his efforts, I do note that, in certain circumstances, I might be inclined to appoint counsel for a plaintiff so situated. Having completed a preliminary review of some of the substantive legal issues raised in this case, however, I do not believe that these are appropriate circumstances for such a disposition. Plaintiffs' allegations, on their face, appear to be of little merit. Indeed, it appears that much of Briehler's claim may already have been litigated. Based on the action brought in state court,

and the decision rendered against plaintiffs there, it appears likely that, notwithstanding the new causes of action asserted and remedies sought here, the doctrine of claim preclusion may well bar suit in this Court against the defendants who prevailed in the prior action. See, e.g., Griffin v. State of Rhode Island, No. 84-1715 (1st Cir. April 16, 1985) (under Rhode Island law, where parties are identical, final judgment rendered on the merits in state court action is conclusive in subsequent federal civil rights action not only as to matters that were actually raised and determined, but as to all matters that could have been raised and determined). Furthermore, even as to the defendants who were not sued in the state court action, the doctrine of issue preclusion may well foreclose recovery by the plaintiffs. To the extent that their claims in the present

action depend upon a finding of the unconstitutionality, illegality, or impropriety of the constable's sale, the Superior Court's finding that the plaintiffs were afforded adequate notice of the sale, and that the sale was otherwise proper, may be entitled to preclusive effect. See e.g., Miller Brewing Co. v. Falstaff Brewing Co., 655 F.2d 5, 9 (1st Cir. 1981) (where party has had full and fair opportunity to litigate an issue, that party precluded from relitigating issues against opposing party as well as other parties); Restatement of Judgments (Second), 27, comment (1982) (discussing preclusive effect to be given prior determination of evidentiary and ultimate fact).[7] While I need not and do not make any ruling as to the effect to which

7. Nor does the fact that there is currently an appeal pending from the final judgment of the Superior Court in any way deprive it of any (Footnote Continued)

the prior state court adjudication would be properly entitled in this Court, I make note of these issues insofar as they were relevant to my consideration of whether this case is sufficiently meritorious to warrant the unusual step of appointing counsel for the corporate plaintiffs.

In sum, it is my judgment that, viewed in its total factual context, this case must be dismissed under Rule 41(b). Plaintiffs having been apprised of the Magistrate's Recommendation and having submitted a full memorandum on the issue, I do not find any purpose would be served by now holding a hearing.

(Footnote continued)
preclusive effect to which it is otherwise entitled. See Armstrong v. Armstrong, 117 R.I. 83, 86 (1976). Likewise, it would be of no avail to plaintiff that he commenced his federal action shortly before the state action in which the prior judgment was rendered. Id. at 87.

Accordingly, plaintiffs' action is hereby dismissed with prejudice.[8]

Enter:

/s/ Raymond Pettine
Senior District Judge

May 17, 1985

---

8. In view of this disposition, I decline to additionally impose sanctions on Briehler in the form of costs and fees to defendants for their attorneys' time at the two November conferences. Defendant Taber's motion requesting same is denied.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1421

ROY P. BRIEHLER, ET. AL.,
Plaintiffs, Appellants,

v.

SYLVIA'S, INC., ETC., ET.AL.,
Defendants, Appellees

Before
Coffin, Bownes and Torruella,
Circuit Judges.

ORDER OF COURT

Entered October 24, 1985

Treating appellants' reply brief as a petition for rehearing, the same is denied.

HORVITZ & HORVITZ & KYRIAKAKIS
321 North Main Street
P.O. Box 2568
Fall River, Massachusetts 02722

(617) 679-2166

November 26, 1984

United States Magistrate Hagopian
Federal Courthouse
Providence, Rhode Island 02903

Dear Magistrate Hagopian:

Re: C.A. No. 83-0173P
Roy P. Briehler, et al
Vs: Sylvia's, Inc., et al

C.A. No. 84-0230B
Roy P. Briehler
vs: Town of Jamestown, et al

Reference is made to the above-captioned cases in regard to which I filed appearance on behalf of the Plaintiff, Roy P. Briehler, for the limited purpose of pre-trial hearing only, held before you on November 18, 1984.

As explained to you, my office was retained on this matter by way of a telephone call from an attorney located in Philadelphia, Pennsylvania. The

telephone call was received late on the afternoon of November 16, 1984. My firm agreed to file an appearance for the Plaintiff, scheduled for November 19, 1984, with the further understanding that the undersigned would review all files in regard to this matter and make a decision as to whether or not our firm wished to continue representing the Plaintiff in each of these cases.

Upon review of all files regarding these matters, which you were kind enough to present to me subsequent to the hearing on November 19, 1984 and again on November 20, 1984, I am writing to inform you that our firm has made a determination that it shall not continue to represent the Plaintiff in these cases. Accordingly, I am notifying you of this decision on behalf of our firm in order that you may adjust your files accordingly, and specifically make

notation that our firm is no longer appearing as Counsel for Plaintiff in these cases, since we only appeared for the pre-trial hearing held on November 19, 1984.

I trust that this is satisfactory for your purposes and if there is a further question regarding this matter, kindly feel free to contact me.

Very truly yours,

/s/ Manuel Kyriakakis

for HORVITZ & HORVITZ & KYRIAKAKIS

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

Case No. 85-1227

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROY P. BRIEHLER,
PETITIONER,

v.

SYLVIA'S INC., a Rhode Island corporation, WILLIAM BURGIN, JOSEPH PERRY, DAVID F. FOX, ROBERT M. SILVA, LTD., DENNIS TABER, POSEIDON VENTURE, INC. a Rhode Island corporation, and JERRY L. McINTYRE,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I

QUESTIONS PRESENTED

1. Does this Petition involve a question of gravity and general importance and/or a question on which the Circuit Courts are in conflict, which would justify this Court in granting the Writ?

2. Did the Circuit Court of Appeals err in upholding a decision of the District Court dismissing Plaintiff's Complaint?

3. Did the Circuit Court of Appeals err in upholding a decision of the District Court denying Plaintiff's Motion for a change of venue?

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

CASE NO. 85-1227

ROY P. BRIEHLER,
PETITIONER,

v.

SYLVIA'S INC., a Rhode Island corporation, WILLIAM BURGIN, JOSEPH PERRY, DAVID F. FOX, ROBERT M. SILVA, LTD., DENNIS TABER, POSEIDON VENTURE, INC. a Rhode Island corporation, and JERRY L. McINTYRE,
RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Dennis Taber, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the First Circuit Court of Appeals.

Proceedings Below

In March, 1983, Petitioner Roy P. Briehler filed a complaint in the Federal District Court for the District of Rhode Island,

naming as Defendants, Sylvia's Inc., Joseph Perry, Robert Bryer, William Burgin, Poseidon Venture, Inc., attorneys David F. Fox, Robert M. Silva, Ltd. and Jerry L. McIntyre, and Dennis M. Taber. Dennis M. Taber is a Constable qualified to serve process in both the Federal and State Courts in Rhode Island. Shortly thereafter, Petitioner's complaint was amended to add as parties Plaintiff, Briehler Properties, Inc. and Roy Briehler's of New Jersey, Inc.

Thereafter, discovery ensued, resulting in a settlement conference held in the chambers of Senior District Judge Raymond Pettine on December 2, 1983. At his direction, additional settlement conferences were held amongst the parties which were unsuccessful. On November 4, 1984, Petitioner filed a Motion seeking to have the venue of the case changed to New Jersey. That Motion was denied by District Court Judge Raymond Pettine on November 27, 1984. Thereafter, an additional settlement conference was noticed before Magistrate Jacob Hagopian, to be held on November 14, 1984. All parties were noticed. Although counsel for all Defendants appeared, Petitioner did not appear, nor did any counsel appear on his behalf. The settlement conference was re-scheduled for November 19, 1984, but Petitioner again failed to appear. An attorney, Manuel Kyriakakis did appear, but with no knowledge of the litigation, no settlement authority and no intention at that time to file an appearance on Petitioner's behalf. (See *Petition for Writ of Certiorari*, Appendix, A-25 through A-27). Thereafter, Magistrate Hagopian formally recommended to Judge Pettine that Petitioner's complaint be dismissed pursuant to Federal Rule of Civil Procedure 41(b). That recommendation was accepted by Judge Pettine in an Opinion and Order, dated May 17, 1985.

Petitioner filed a timely appeal to the U.S. Court of Appeals for the First Circuit of Judge Pettine's Order of Dismissal and of his Order denying Petitioner's Motion for a change of venue. On September 12, 1985, the First Circuit Court of Appeals

affirmed both Orders of the United States District Court. On October 24, 1985, the First Circuit of Appeals denied Petitioner's Motion for a re-hearing.

Jurisdiction

Jurisdiction is provided to this Court to consider this Petition pursuant to the provisions of 28 U.S.C. § 1254(1) which provides as follows:

> § 1254 Courts of Appeals; Certiorari; Appeal; Certified Questions
>
> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . .

Statutes And Constitutional Provisions Involved

Respondent denies that this case involves the denial of a right protected by the Constitution of the United States.

28 U.S.C. § 1404(a) provides as follows:

> For the convenience of parties and witnesses in the interest of justice, a District Court may transfer any civil action to any other District or Division where it might have been brought.

Rules Of Federal Procedure

Federal Rule of Civil Procedure 41(b) provides as follows:

> Involuntary dismissal: Effect thereof—
> For failure of the Plaintiff to prosecute or to comply with these rules or any order of Court, a Defendant may move for dismissal of an action or of any claim against him . . .

> Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision or any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Statement of the Case

This litigation results from a Constable's sale, held in Jamestown, Rhode Island, on February 26, 1983, to satisfy an unpaid Rhode Island State District Court Judgment in favor of Sylvia's Inc. and against Roy P. Briehler and another corporation not a party to the current action. Attorney and Respondent David Fox, of the law office of Robert M. Silva, Ltd. represented Respondent Sylvia's Inc. in that litigation. The subject of the Constable's sale was a ferry boat, allegedly held in the name of Roy P. Briehler and/or other corporate Plaintiffs, and was conducted by Constable and Respondent Dennis M. Taber pursuant to a state district court order. The high bidder at that auction was Respondent William Burgin, who later conveyed ownership of the vessel to himself and Respondent Jerry McIntyre d/b/a Poseidon Venture, Inc. Briehler, claiming countless errors in the noticing and conduct of that Constable's sale and in the sale of the ferry boat to Burgin and McIntyre, brought not only this action but a nearly identical action in Rhode Island State Superior Court (*Roy P. Briehler, Briehler Properties, Inc., Roy P. Briehler of New Jersey Inc., and Katherine Worthington* v. *Poseidon Venture Inc., William Burgin, Sylvia's Inc., and Jerry McIntyre* [January 1986] # 84-188-Appeal). That action was tried to a Providence County jury in late 1983, and resulted in directed verdicts against Briehler and in favor of Defendants, verdicts which were affirmed by the Rhode Island Supreme Court in December, 1985.

Briehler has always represented himself in the federal action. The corporate Plaintiffs were initially represented by Rhode Island attorney, Raymund Sardut, who withdrew in May of 1984. Briehler was given 60 days to secure new counsel, but has never been able to do so, although he claims to have exhausted the Martindale-Hubbell listing of attorneys in Rhode Island. Six months later, a settlement conference was called before Magistrate Jacob Hagopian for November 14, 1984. All parties were noticed. The morning that the conference was to be held, Briehler telephoned the Magistrate, stating that he was in Florida and could not attend the conference due to the existence of an outstanding civil warrant for his arrest in Rhode Island. He asked to be contacted during the conference at either of two telephone booths. Magistrate Hagopian declined this method of conferencing. When defense counsel appeared on November 14, they were advised by the Magistrate that the conference had been re-scheduled for November 19, and that Briehler had been directed to appear on the new date.

On November 16, Briehler contacted the Magistrate's office to state again that he would not return to Rhode Island because of the warrant, and that he had not been able to retain counsel. He was nevertheless directed by the Magistrate either to appear personally or through counsel on November 19. On November 19, Briehler failed to appear, but attorney Manuel Kyriakakis was present on his behalf. Kyriakakis indicated he had been contacted late on the previous day to make his appearance, that he was unfamiliar with the case, had not decided whether to formally enter an appearance on behalf of Briehler and had no settlement authority. He later informed the Court in writing that he did not intend to enter his appearance on behalf of Briehler. (See *Petition for Writ of Certiorari*, A-25 through A-27). On the basis of the foregoing, the Magistrate concluded, in a recommendation to Judge Pettine, that the case be dismissed, that the Plaintiff "Briehler did not just fail

to appear because of some mistake or inadvertance, but considering the reasons communicated to the Court for his failure to appear, adamantly refused to appear" and as such had displayed a "reckless disregard for the Court's authority." The Magistrate therefore recommended that the Plaintiff's complaint be dismissed under Federal Rule of Procedure Rule 41(b), a recommendation that was accepted by Judge Pettine (See *Petition for Writ of Certiorari*, A-4 through A-23).

In that decision, Judge Pettine adopted the recommendations of the Magistrate on four grounds:

> 1. Briehler's continuing and expressly stated inability to secure counsel for the corporate Plaintiff's;
> 2. Briehler's unwillingness to come to Rhode Island due to the outstanding civil arrest warrant;
> 3. Briehler's willful failure to appear himself or through counsel at either of the November, 1984 settlement conferences;
> 4. The fact that Plaintiff's claims contained in the federal Complaint had been substantially litigated already in another forum.

On November 27, 1984, Judge Pettine had previously denied Briehler's Motion for a Change of Venue of the cause to the State of New Jersey.

REASONS WHY WRIT SHOULD BE DENIED

Argument

I. THIS PLTITION DOES NOT PRESENT CONSTITUTIONAL OR FEDERAL QUESTIONS OF SUCH GRAVITY OR GENERAL IMPORTANCE AS TO MERIT REVIEW BY THIS COURT NOR IS THERE ANY CONFLICT BETWEEN CIRCUITS ON ANY OF THE QUESTIONS PRESENTED.

In reviewing an opinion of a Court of Appeals, this Court has generally held that certiorari is in order when the follow-

ing circumstances pertain: the legal issues raised by the Petition involve questions of gravity and general importance; *Fields* v. *United States*, 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543 (1907) and/or the Petition reflects a conflict between state and Federal courts or Federal courts of different circuits concerning an important legal question. See *Fields* v. *United States, supra; Commissioner* v. *Bilder*, 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881 (1962).

Petitioner has not alleged any conflict between Federal circuit courts or between any Federal or state court as to the issues raised in his Petition.

In addition, Petitioner has not raised issues in his Brief of importance to any one but himself, though he has attempted to cast his Petition in terms of constitutional infringements by the Federal District Court for the State of Rhode Island and First Circuit Court of Appeals. In fact, this case raises no constitutional issues. It is tempting and in fact, probably frequently happens, for a Plaintiff whose case is dismissed prior to trial for procedural reasons, to claim a lack of due process. However, the authority of a Federal District Court Judge to dismiss a Plaintiff's complaint for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) has been declared constitutional on a number of occasions, most notably in this Court's decision in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). This Petition represents nothing more than this Petitioner's continuing disagreement with the District Court's dismissal of his Complaint pursuant to that Rule. The validity of that Rule is not in question. Petitioner's challenge to the application of that Rule to his cause would require this Court—as was required of the First Circuit Court of Appeals—to review the factual findings of the District Court which resulted in dismissal of Petitioner's Complaint. This Court has previously stated that it will not do this. See *United States* v. *Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

The same arguments apply equally with regard to this Petitioner's attempt to seek review by this Court of the denial by the District Court of his Motion for a change of venue. Petitioner's cavalier paragraph (See *Petition for Writ of Certiorari*, pp. 29-30) that denial for his Motion for a Change of Venue "sanctions the imposition of conditions upon the Petitioner which are not authorized by reason and by law and were not intended by the framers of the Federal Rules of Civil Procedure" does not even represent an attempt to provide this Court with any basis to review this venue ruling.

II. The Court Of Appeals Ruled Correctly In Affirming The District Court's Dismissal Of Plaintiff's Complaint Pursuant To Federal Rule Of Procedure 41(b).

Federal Rule of Procedure 41(b) provides for the involuntary dismissal of a Complaint for the failure of a Plaintiff to diligently prosecute it. Although the Rule refers to the filing of a Motion by a Defendant, it has been generally held that the Court itself may enter a Rule 41(b) dismissal *sua sponte* in an exercise of its discretion. See *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). That case provided as follows:

> Neither the permissive language of the Rule—which merely authorizes a motion by the Defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of Courts acting on their own initiative to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a Court to dismiss *sua sponte*, for lack of prosecution, has generally been considered an "inherent power" governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. 370 U.S at 630-631, 82 S.Ct. at 1388 through 1389.

It is axiomatic that dismissal for want of prosecution lies in the discretion of the Court. See *Schaeffer* v. *Warehouse Employees Union Local No. 730*, 408 F.2d 204, 132 U.S. App. D.C. 401, *certiorari denied* 395 U.S. 934, 23 L.Ed.2d 449, 89 S.Ct. 1996 (CA 1969). The First Circuit of Appeals held, in considering Petitioner's appeal, that: "Under the circumstances of this case: Petitioner's failure to respond to Court Orders; the failure to obtain counsel for the corporate Plaintiffs; and his general refusal to come to Rhode Island to participate in pre-trial proceedings, we find no abuse of discretion in the judgment of dismissal" (See *Petition for Writ of Certiorari*, A-1 through A-2).

1. *Briehler's Inability to Obtain Counsel for the Corporate Plaintiffs.*

Although Briehler could represent himself *pro se* in Federal District Court, he could not, not being a member of the Rhode Island Bar, represent the corporate Plaintiffs. *In Re Victor Publishers, Inc.*, 545 F.2d 285, 286 (1976). (This Court should note that Petitioner has filed the instant Petition only in his own name, deleting the various corporate Plaintiffs who were parties in the District Court suit and appeal to the First Circuit). References in Briehler's brief filed with this Court describe the efforts he claims he took to secure such counsel. At page 6 of his Brief, Briehler says "over the next six months Plaintiff Briehler corresponded with every Rhode Island attorney and/or law firm listed in Martindale-Hubbell, in an effort to retain new counsel." Given the fact that there are 2,000 licensed members of the Rhode Island Bar, (Respondent presumes most if not all of them are listed in Martindale-Hubbell), this statement is difficult to believe. One suspects, assuming Briehler made an attempt to contact even one quarter of the Rhode Island licensed bar, that there may be reasons that he was unable to secure representation which he was unable or unwilling to state in his Brief. Nevertheless, as District Court

Judge Pettine stated in citing *In Re Victor Publishers Inc., supra*, an inability to secure such counsel on behalf of the corporate Plaintiffs, has been held to be satisfactory reason for a Rule 41(b) dismissal.

2. *Briehler's Refusal to Enter the State of Rhode Island.*

Not only was Briehler unable to secure counsel for the corporate Plaintiffs but he made it clear on a number of occasions that he was unwilling to come into the jurisdiction while there was a civil arrest warrant pending for him. Though Briehler's Brief challanges the legality of this warrant, by accusing some of the Defendants in the action of conspiring with the Town of Jamestown to bring it about, the sufficiency of that warrant never been legally questioned. It therefore became apparent that as long as the warrant is outstanding, Briehler's litigation could not proceed anywhere in Rhode Island, because Briehler would not appear and was unable to secure the services of a licensed attorney to prosecute the case in his absence. Even if he had such counsel, his personal attendance at settlement conferences or at trial was doubtful. Cited in the lower Court's decision is the case of *Bottos* v. *Pivarnik*, 98 F.R.D. 416 (N.D. Ind. 1982) *aff'd* 714 F.2d 147 (7th Cir. 1983), whereby a Rule 41(b) dismissal of Plaintiff's action was upheld, where the Plaintiff refused to enter the state of Indiana because of an outstanding arrest warrant.

3. *Briehler's Failure to Appear at the November, 1984 Settlement Conferences.*

The Magistrate scheduled two settlement conferences in November, 1984. In May of 1984, counsel for the corporate Plaintiffs had withdrawn his appearance. Briehler had been given an additional 60 days to secure replacement counsel. By November 14, 1984, when the first conference was scheduled, such counsel had not been obtained. Petitioner has complained

he did not receive written notice of that conference, but it is in fact true that none of the Defendant's counsel received written notice, all parties having been notified by telephone, from the District Court Clerk's Office. There has been no assertion by Petitioner that he did not receive oral notice of the two hearings, and in fact, the facts (his phone call to the Magistrate) would indicate otherwise. When Briehler did not appear at the first conference, a second was scheduled. On both occasions, defense counsel for all of the Defendants were present. On both occasions, Briehler declined to appear.

Briehler's Petition mentions the attendance of Katherine Worthington, a companion of Briehler's, and a Plaintiff in another Rhode Island District Court suit emanating from the same Constable's sale, who Briehler claims had authority to act in his behalf. Such a person could hardly satisfy the requirements of a settlement conference, as she was not the Plaintiff herself, nor was she licensed counsel who had entered an appearance. Even the attorney who appeared on November 19, Manuel Kyriakakis, was of no help to the Court, having no familiarity with the case, no settlement authority, and having not even decided at that time whether he would be entering an appearance on behalf of the Petitioner. In fact, he later declined to do so. Briehler had already told the Magistrate's Office that he had already contacted 500 members of the Rhode Island Bar Association to no avail. These circumstances made it very clear to the Magistrate that the case could not progress through the remaining discovery, Court sponsored settlement conferences, and ultimately to trial. He thereupon recommended dismissal to the Court.

III. The Circuit Court Did Not Err In Affirming The Denial By The District Court Of Petitioner's Motion For A Change Of Venue.

Petitioner's Motion for a Change of Venue is presumably based upon 28 U.S.C. § 1404(a), which provides that the venue

of a case may be changed for the convenience of parties and witnesses to another District where the action might also have been brought. That section gives the District Court the discretionary power to transfer a case to a different venue in appropriate circumstances. However, the moving party must show that the proposed transfer district is not merely equally convenient, but that it is more convenient. See *Wurzburgher, Morrow and Keough, Inc.* v. *Keystone Company of Boston*, 361 F. Supp. 637 (D. Mass. 1973). The moving party must demonstrate further that the factors strongly favor transfer. See *Aetna Casualty and Surety Company* v. *Singer-General Precision, Inc.*, 323 F. Supp. 1141 (D. Del. 1971).

In his Motion to the District Court, Petitioner mentioned the outstanding civil warrant for his arrest in the State of Rhode Island, and his New Jersey residence and business connections. He also vaguely alluded to a conspiracy involving every member of the Rhode Island Bar. He did not mention, but the Court was aware that all of the Defendants were Rhode Island residents and that the ferry boat in question was moored in Rhode Island. The Court also knew that the greatest number if not all of the material witnesses who would testify at trial were located in Rhode Island.

Finally and most importantly, Petitioner failed to prove that the proposed transferee district was one in which the action "might have been brought." A Court may not transfer an action to District Court in which Defendant is not subject to the personal jurisdiction of the transferee Court. See *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L.Ed.2d 1254, 80 S.Ct. 1084 (1960). Since the Petitioner failed to prove that any of the Defendants were subject to the jurisdiction of the proposed transferee district, 28 U.S.C. § 1404(a) was not applicable; the District Court acted properly in denying his motion and the Court of Appeals acted properly in affirming this denial.

Conclusion

The Petition filed in this matter raises neither substantial constitutional issues of law, nor does it raise issues that have been disparately handled by the Circuit Courts and/or state courts. Petitioner has attempted to fashion constitutional issues out of a case which in fact raises none. The Federal District Court for the State of Rhode Island reviewed the factual travel of this case and the identity of the parties in its two rulings which are at issue here—the denial of a change of venue and the dismissal of the action itself. Its discretionary rulings on these factual points were appropriately upheld by the First Circuit Court of Appeals. Although the First Circuit opinion does not mention it, this Petitioner has in fact already had his day in Court in a Rhode Island state action in which virtually all of the issues raised in the Federal action as to the legal sufficiency of the Constable sale were raised. In the state cause, Petitioner was represented by competent legal counsel. Petitioner's prayers for relief in the state action were disposed of by directed verdicts entered on behalf of Defendants, which have been upheld on appeal. Petitioner has had his day in Court—this is reflected in the decision of Rhode Island Federal District Court Judge Pettine who referred in his decision dismissing Petitioner's Complaint to the preclusionary effects of the State Court action. (See *Petition for Writ of Certiorari* at pp. A-19 through A-22).

Respondent Dennis M. Taber therefore respectfully requests that Roy P. Briehler's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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